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IN THE

Supreme Court of the United States

October Term, 1965
No. 88

In the Matter of Disciplinary Proceedings Against
NEIL S. MACKAY, an Attorney at Law,

Petitioner.

Motion to File Supplement to Petition for a Writ of Certiorari, and Supplement to Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska.

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IN THE

Supreme Court of the United States

October Term, 1965
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In the Matter of Disciplinary Proceedings Against NEIL S. MACKAY, an Attorney at Law,

Petitioner.

Motion to File Supplement to Petition for a Writ of Certiorari to the Supreme Court of Alaska.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Neil S. MacKay moves and respectfully applies for an order allowing him to file a Supplement to the Petition for Certiorari to the Supreme Court of the State of Alaska now pending before this Court. The Supplement alleges facts which have occurred since the Petition was fiied, which facts substantially affect the right of MacKay to protection from order of the Alaska Supreme Court which deprived MacKay of rights to which he is entitled under the Constitution of the United States. The Supplement states an additional ground for review by this Court: That Neil S. MacKay has been and is being deprived of equal protection of the laws of Alaska by an order of the Supreme Court of Alaska.

This motion is based on the facts alleged in the Petition, the facts alleged in this Supplement, and the record of the Supreme Court of Alaska, on file with the Clerk of the Supreme Court of the United States.

Dated: June 3, 1966.

JOSEPH A. BALL,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1965
No. 88

In the Matter of Disciplinary Proceedings Against NEIL S. MACKAY, an Attorney at Law,

Petitioner.

Supplement to Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska.

Facts Which Support the Motion to Supplement Petition for Certiorari.

The Alaska Supreme Court adopted rules of procedure, effective January 29, 1965, which, if applied in the matter of MacKay would require that court to set aside its decision and order. The action in the United States District Court between the Alaska Bar Association and others, as plaintiffs, and the members of the Alaska Supreme Court, as defendants, has been dismissed pursuant to the stipulation of all parties. Neil MacKay petitioned the Alaska Supreme Court to reconsider its decision and order in the light of the change in the procedural rules. The Alaska Supreme Court has refused to reconsider its decision. (Opinion, May 13, 1966.) These facts and other facts relevant should be presented to this court by supplement for the following reasons:

1. Certain questions raised in the petition for certiorari are now moot;
2. The facts alleged in this supplement to the petition for certiorari strengthen the claim of the petition that he has been deprived of the right to practice law without due process of law;
3. These facts provide an additional reason why certiorari should be granted, as petitioner has been refused the equal protection of the laws of Alaska.

Jurisdiction to Consider the Additional Question Raised in This Petition.

Petitioner raised the additional question stated in this supplement arising under the Constitution of the United States by petition for reconsideration to the Supreme Court of Alaska, filed in that court on August 19, 1965.

Events Which Have Occurred Since Petition for Writ of Certiorari Was Filed.

(a) Review of facts which are alleged in petition for certiorari.

In the petition for certiorari, petitioner described the unlawful seizure of property from the Alaska Bar Association, and the removal of its officers which caused the association and 165 of its members to file suit in the U.S. District Court for Alaska against the individual members of the Supreme Court of Alaska. While the suit was pending, the Alaska Supreme Court revived old charges against one of the plaintiffs, Neil S. MacKay, and ordered him disbarred. On November 5, 1964, the Supreme Court of Alaska ordered a rehearing in the matter of the petition of MacKay. While the matter was pending on rehearing in the Supreme Court of

Alaska, new rules of procedure were adopted by the Alaska Bar Association and these rules were approved and adopted by the Supreme Court of Alaska as court rules. (Order No. 75, dated January 29, 1965.)

(b) Facts not alleged in the petition for certiorari.

The Juneau Meeting.

The rules of procedure adopted and approved by the Supreme Court of Alaska on January 29, 1965, were the result of a settlement between the bar and the members of the Alaska Supreme Court. On December 16 and 17, 1964, the members of the board of governors of the statutory bar met with the members of the Alaska Supreme Court in Juneau, Alaska. Alfred J. Schweppe of Seattle, Washington, Chief Justice Hugh J. Rossellini of the State of Washington, and Chief Justice William N. McAlliste of the State of Oregon, acted as mediators at the request of the American Bar Association. The contending parties adjusted all of their differences at this meeting. They agreed that the court would recognize the statutory bar as the integrated bar of Alaska; that the court would rescind the rules promulgated by Rule No. 64, on June 1, 1964, which purported to integrate the bar by court rule and purported to govern the bar by court order.[1] They also agreed that the Alaska Bar Association would adopt rules of procedure pertaining to discipline and admissions which would be subject to the approval of the court. If adopted, the rules would be rules of the Supreme Court of Alas-

[1]Thomas Stewart, administrative director of the Alaska court system who was present at the Juneau meeting testified that Chief Justice Nesbett stated at the Juneau meeting the Alaska Bar Rules (Rule 64) would be rescinded. [p. 48, line 23, to p. 49, line 1, Tr. of Proceedings before Federal District Court.]

ka. Rules of procedure were drafted at Juneau. The parties then entered into a stipulation to dismiss the action in the Federal District Court as soon as the bar and the court had approved the Juneau rules. [Exs. A and B, Motion to Defer Decision.]

Throughout the discussions at Juneau, the Bar had insisted that there was no need for the court to review a dismissal of a charge against a lawyer after hearing by a board of governors. The mediators advised the group that this was in accordance with procedures followed in the states of Washington and California.[2] Section 12 of Rule I of the Alaska Bar Rules was the product of this discussion.

This rule made some change in the statutory procedure which had been in effect in Alaska under the Integrated Bar Act. The statute required that the board certify the record to the Supreme Court of Alaska after dismissal but the court was required to enter the dismissal in accordance with the board's findings. (§6, Chap. 178 SLA 1960.) Section 12 of the new rules prepared at Juneau provided that the board itself should make "findings, conclusions and its recommendations as to whether the formal complaint shall be dismissed . . ." and in the event of dismissal "the record of the proceeding shall be retained in the office of the Association. . . ." [Ex. B, Motion to Defer Consideration.] The rule thus approved the procedure which had been inadvertently followed by the board of

[2]Alfred J. Schweppe testified before the U.S. District Court on June 16, 1965, that Chief Justice Nesbett suggested that the court should review a dismissal of a complaint which had been dismissed after a divided vote of the board of governors. The members of the board disagreed. After a caucus, "the court instructed me to say that it would not press its position any further." [p. 41, Tr. of Proceedings, U.S. District Court.]

governors of the Alaska Bar Association in the matter of MacKay. After dismissal of charges against MacKay on December 1, 1961, the record was not forwarded to the court. To this day the Supreme Court of Alaska has no certified record of proceedings before either the trial committee or the board of governors in the matter of MacKay.

The Alaska Bar Association fully complied with the agreement of settlement. The rules prepared at Juneau were adopted without change by a plebiscite of the members conducted January 15, 1965. On January 29, 1965, the court approved the Juneau rules (Order No. 75) with one qualification: only future cases would be governed by the new rules; pending cases would be subject to the old procedures, which had been the subject of dispute (Order No. 64, June 1, 1964).

This was not a full compliance with the agreement. The Juneau rules were to apply to pending cases. Section 25 of Rule I (Juneau rules) reads in part as follows:

> "Section 25. *Construction.* . . . The provisions in the various sections of this rule shall be liberally construed for the protection of the public, the courts and the legal profession, and shall apply to all *pending matters* of misconduct and reinstatement *so far as may be practicable*, and to all future matters notwithstanding the alleged misconduct occurred prior to the effective date hereof. To the extent that application of any provision of this rule to any pending matter shall not be practicable, the rules in effect at the time this rule becomes effective shall continue to apply." [Ex. B, pp. 18-19, Motion to Defer Decision.] (Emphasis ours.)

On January 30, 1965, the Alaska court filed a written opinion suspending MacKay from the practice of the law for one year.[3] This decision did not consider the application of the Juneau rules to the MacKay matter as on the day before, January 29, 1965, the court had expressly provided (by Order No. 75) that the Juneau rules did not apply to pending cases.

But if the Alaska court was of the opinion that the settlement did not require that the Juneau rules should apply to a "pending" case, it was an opinion not shared by the members of the Alaska Bar Association or its board of governors. The order of the Alaska court which qualifiedly approved the Juneau rules was followed the next day by the decision in the matter of MacKay, which refused to apply the Juneau rules to a "pending" case. The reaction of the bar was as might be expected. A special convention of the Alaska Bar Association was called in Anchorage on February 15, 1965. A resolution was adopted which instructed counsel for the Alaska Bar Association to request a decision in the matter then pending in the U.S. District Court. The board of governors submitted the same question by plebiscite to all members of the Bar of Alaska and the members voted for an immediate decision. The defendants made a motion for dismissal in the U.S. District Court, or, in the alternative, for summary judgment.

The matter was called for hearing on June 15, 1965, before the three-judge U.S. District Court in Anchorage, Alaska. The defendants contended that there had been an accord and satisfaction at the Juneau meet-

[3]The order pursuant to decision was dated February 8, 1965. This order has been stayed pending petition for certiorari to this Court. [Exs. C, D, Pet. for Cert.]

ing, which required a dismissal of the action. The plaintiffs (Alaska Bar Association and bar members) contended that there had been an accord but no satisfaction, in that the defendants had given only qualified approval to the Juneau rules. During the course of proceedings, Thomas Stewart, administrative director of the Alaska court system, testified that paragraph 3 had been inserted in Order No. 75 by inadvertence. He advised the Federal judges that the Alaska court wished to comply with the Juneau settlement.[4] A judge of the U.S. District Court expressed the view that the bar had fully complied with the agreement but that the defendants had not complied. (Proceedings, U.S. District Ct. p. 92, line 17, to p. 93, line 1.) The lawyer for the Alaska Bar Association stated that if the Supreme Court of Alaska would adopt the Juneau rules *nunc pro tunc* as of January 29, 1965, without qualification, the action should be dismissed pursuant to the stipulation. (Proceedings, U.S. District Ct. p. 89, line 26, to p. 90, line 1.)

On June 16, 1965, the U.S. District Court ordered that the action should be dismissed when the Supreme Court of Alaska entered an order making the Juneau rules effective as of January 29, 1965. The Alaska Supreme Court did enter such an order and the action was dismissed. Plaintiffs thus accomplished the purpose of the hearing (1) to obtain unqualified

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[4]In the Memorandum of the Supreme Court of Alaska filed in reply to petition for certiorari, it is said, "thereafter the bar association attempted to repudiate the settlement upon various grounds. . . ." (Memo., Appendix 8, p. 2.) This is, of course, contrary to the facts disclosed in the proceedings in the Federal District Court on June 15 and 16, 1965. The members of the Alaska court were forced to comply with the terms of the settlement as a condition of dismissal.

approval of the Juneau rules; and (2) to make them applicable to all "pending" matters.

Following the entry of the order, which made the procedural rules applicable to pending cases as of January 29, 1965, MacKay petitioned the Supreme Court of Alaska for reconsideration of its decision of January 30, 1965 and its order of February 8, 1965, which suspended him from practice for a period of one year. In that petition he urged that the Juneau rules should be applied to his matter and that the failure to give him the benefit of the rules would deny him the equal protection of the laws of Alaska in violation of his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Alaska Supreme Court failed to act promptly on the petition for reconsideration in the matter of MacKay. On September 15, 1965, MacKay advised this court that events had occurred which might render moot certain issues presented by the petition for certiorari, and urged that the Supreme Court of Alaska should be given the opportunity to rule on his petition for reconsideration in the light of those events. The motion was granted, and this court entered an order to defer decision on petition for certiorari until the Alaska Supreme Court could pass on the questions presented by MacKay's petition for reconsideration.

On May 31, 1966, the Clerk of the Supreme Court of the United States received in the mail an opinion of the Supreme Court of Alaska (dated May 13, 1966),

which denied petition of MacKay for reconsideration. As a result certain issues presented by the petition for certiorari have been rendered moot by the recited events and by the decision of the Supreme Court of Alaska. MacKay has now an additional reason to Petition for Certiorari.

Questions Presented in the Original Petition Which Are Now Moot.

Questions 1 and 2, presented on page 2 of the petition, are now moot. The action in the Federal District Court has been dismissed. There is no need for this Court to determine whether or not the Supreme Court of Alaska should have deferred a decision on Federal and Constitutional questions, which were at that time pending before the Federal District Court; there is no need to determine whether the judges of the Supreme Court of Alaska were biased by reason of their position as defendants in the action before the Federal District Court.

Questions Presented and Remaining for Decision.

The events above recited reduce the problem on petition for certiorari to the following questions:

1. Did the Supreme Court of Alaska deprive this petitioner of property without due process of law and fail to give him the equal protection of the laws when it suspended him from the practice of the law:

(a) By a decision based on facts taken from incomplete uncertified hearsay copy of a transcript of

notes from a stenographer who had no official position?

(b) By failing to give petitioner due notice of charges against him, the right to confront witnesses called against him, and the right to cross-examine said witnesses?

(c) By giving retroactive effect to a rule of court in a bar discipline case? [pp. 2-3, Pet. for Cert.]

2. After acquittal of charges against petitioner by the administrative authority which was authorized to hear such charges by the Alaska statute, is the Supreme Court of Alaska estopped to revive and reconsider these charges?

And an additional question presented by this supplement to the petition: [p. 3, Pet. for Cert.]

3. Was petitioner MacKay refused the equal protection of the laws of Alaska when the Supreme Court of Alaska refused to apply its own procedural rules to MacKay's pending matter?

ARGUMENT.

I.

The Due Process Question.

The Supreme Court of Alaska has filed three decisions in the matter of MacKay: one on October 26, 1964, the day before the case was called for trial in the U.S. District Court; one on January 30, 1965, ordering the suspension of MacKay from the practice of law for one year; and the third on May 27, 1966 (dated May 13, 1966), which denied MacKay's petition for reconsideration. In each decision the court purports to quote facts from a record. What record? The court confesses in its decision that it had before it no certified record from a trial committee or from the board of governors of the Alaska Bar Association. Under the rules, the trial committee must certify a record of evidence taken before it to the board of governors of the Alaska Bar Association. Under the statute, the board of governors is the only body authorized to make findings and certify a written record of evidence taken at a hearing to the Supreme Court of Alaska (§6, Chap. 1788 LA 1960). The association records which were unlawfully seized by the members of the court, contained no record of the hearing before the trial committee nor of any record of any oral hearing before the board of governors. Only the minutes of the board meeting were seized. [P. 3, Ex. A, Pet. for Cert.] The court described the informal method by which it obtained the facts which it quotes as literal truth in its three decisions. "Inquiry of the then president elicited the com-

ment that he believed that since the case was disposed of in favor of the accused the records were all destroyed. The court succeeded in obtaining copies of the pleadings from a member of the trial committee and a transcript of the testimony from the court reporter." [P. 5, Ex. A, Pet. for Cert.] The original transcript of record was forwarded with all exhibits to the board of governors in 1961. Some three years later, an employee of the Supreme Court of Alaska obtained from one Bonnie Dodd an uncertified collection of transcribings without exhibits. [Pp. 41, 42, Ex. E, Pet. for Cert.] So the Supreme Court of Alaska has nothing before it which certifies to the truth or accuracy of trial proceedings or oral proceedings before the board of governors.

If the Supreme Court of Alaska wished to revive the charges against MacKay in August 1964, it could have followed two procedures which would have adequately protected the rights of MacKay to be confronted with witnesses and the right to be heard. It could have ordered the board of governors to certify a full record to the court; that is, a transcript of evidence, plus exhibits, and a transcript of proceedings before the board of governors, as well as minutes of those proceedings. This it did not do and it is no excuse for the court to say that it was the board's statutory duty to certify the record to the court. This is a confession that the court has no record before it. The Supreme Court of Alaska could have initiated a new hearing of the charges with notice to MacKay. This procedure the court did not adopt. Instead employees of the court searched various areas where information might be found and the court relied on this uncertified hearsay to disbar and then later to suspend MacKay from the

practice of the law. This procedure is indefensible. Without a record, an appellate court cannot review. To act on the written words of an uncertified record is to act on hearsay and to deprive the accused of a right of confrontation and cross-examination of witnesses. In addition, the court deprives MacKay of the equal protection of the laws. No lawyer of Alaska before or since has been disciplined on an uncertified record.

II.

MacKay Is Entitled to the Benefits of a Court Rule Adopted by the Supreme Court of Alaska Before Its Decision in the Matter of MacKay.

This controversy began in August 1964, when the Supreme Court of Alaska claimed the right to review the MacKay decision by reason of its inherent power to discipline members of the Alaska Bar. The court has since that time adopted rules of procedure which restrict its "inherent power" to review proceedings before the board of governors of the Alaska Bar Association. The Court has ordered that dismissal of a complaint against a member of the Alaska Bar will not be reviewed and that the record shall remain in the office of the association. This is an exact description of the procedure followed in the matter of MacKay, in 1961. The rules also provided that the new rules "shall apply to all pending matters of misconduct and reinstatement so far as may be practicable. . . ."

The petition for reconsideration required the Alaska court to explain why it would not apply its rules to the MacKay matter. In the recent decision (May 13, 1966), the Alaska court refused to give MacKay the benefit of it own rules: it declared that MacKay's matter

was not a "pending" matter on January 29, 1965; and it declared that was not "practicable" to apply the new rules to the MacKay matter.

(a) The MacKay Matter Was a "Pending" Matter Within the Meaning of the Rules on January 29, 1965.

The decision states that the MacKay matter was final and not pending when the new rules went into effect on January 29, 1965. "Respondent's matter had been fully processed and disposed of by decision and order and was not a pending case at the time Rule I was agreed upon." (P. 14, Opinion, May 13, 1966.) But the court declares that the term "pending" is "synonymous with or connoting 'depending, remaining undecided, not terminated.'" (P. 20, Opinion, May 13, 1966.) Each adjective describes the status of the proceedings against MacKay. A rehearing had been granted MacKay in November 1964; the matter was not "terminated" as it awaited decision; it remained "undecided" as evidenced by the later opinion of the court on January 30, 1965. None of the cases cited in the opinion of the Alaska Supreme Court (May 13, 1966) which purport to define the term "pending" are persuasive or pertinent to the question. A matter is "pending" as long as it is under appellate review. If a statute under which a defendant is convicted of a crime is repealed pending appeal, the conviction must abate. (*Bell v. Maryland*, 378 U.S. 226; *Hamm v. City of Rock Hill*, 379 U.S. 306.)

The Alaska Supreme Court states "the construction of 'pending' as aided by the above-mentioned authorities precludes the obvious absurdity that proceedings initiated, conducted, and concluded under a previous statute must be obliterated and recommenced." (Pp. 24, 25, Opinion, May 13, 1966.) But the statute under which

proceedings against MacKay were initiated and conducted also precludes review by the court after the matter was "concluded" by a dismissal of charges against MacKay.

(b) It Is Practicable to Apply the Rules of Court to the MacKay Proceedings.

The Alaska Supreme Court in its denial of petition for reconsideration declares it would not be "practicable" to apply the rules adopted January 29, 1965, to the review of the MacKay proceedings. The court makes blanket statements but gives no good reason why the procedure under the new rules is not practicable. This was the practice before January 29, 1965. (The Alaska Integrated Bar Act so provides.) It has been the practice since January 29, 1965. The Supreme Court of Alaska has attested to the reasonableness of the procedures by adopting this rule of "no review of dismissals". Unless the rules are followed in the matter of MacKay, he will be the only lawyer in the history of the Alaska Bar who was not given the benefit of a procedural rule which has been declared by both the legislature and the Alaska Supreme Court as a reasonable procedure. This is discrimination to the extreme. The only reason given by the court for the "impracticable" effect of the rule in the matter of MacKay is that the matter was not "pending" on January 29, 1965.

"Obviously it would not be a practicable thing to annul the entire proceedings, including final disposition in this case, and hold that the matter should be processed anew." (P. 20, Opinion, May 13, 1966.) But the rules do not require that the matter "be processed anew". They require that the processing by the board of governors, which resulted in a dismissal of the charges on

December 1, 1961, shall be final. Particularly ineffective is this feeble effort to excuse a refusal to apply the law equally to MacKay as to all others, when we reflect that if the decision stands, MacKay will be the only Alaska lawyer before or since January 29, 1965, who will be disciplined after charges have been dismissed against him by the board of governors of the Alaska Bar Association.

Conclusion.

This has been a distressing experience for the Bar and Bench of Alaska. The Alaska Bar Association went to court to establish the principle that all lawyers of Alaska should be given equal treatment. We can now only appeal to this court to enforce that principle.

Respectfully submitted,

JOSEPH A. BALL,
Attorney for Petitioner.